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SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

Oliver H. Claypool, Jr., and
Oliver H. Claypool, Jr. as next
friend of Oliver J. Claypool,
Christine O. Claypool, and
Robert L. Claypool,

Appellants.

No. 86-1840

vs.

Elizabeth J. Claypool,

Appellee

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question, the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on, and that the judgment rests on an adequate non-federal basis.

OPINION BELOW

This is an appeal from the unpublished, Memorandum Opinion of the South Carolina Supreme Court, summarily disposing of all but one of Appellant's sixty-one (61) exceptions to an Order of the Family Court for the Fifteenth Judicial Circuit of South Carolina. The sole exception discussed by the South Carolina Supreme Court resulted in the reversal, on factual grounds, of a contempt citation for refusal to pay child support issued against the Appellant. The child support issue has been remanded to the lower court for further action.

JURISDICTION

Appellant's Jurisdictional Statement misstates the record below in an attempt to develop proper jurisdiction in this Court.

Jurisdiction is primarily predicated on 28 U.S.C. §1257(1). As discussed below, most of the Appellant's points for review by this Court were not expressly passed on (in the unpublished Memorandum Opinion) by the South Carolina Supreme Court. That opinion, filed April 6, 1987 and appended to Appellant's Jurisdictional Statement (page 1a) can, under Rule 23 of the Rules of the Supreme Court of South Carolina (as amended), quoted in Appellant's Jurisdictional Statement (page 16), rest on one of four possible bases. Subsection (4) of that Rule could be used to sustain a judgment below on adequate non-federal grounds such as mootness, improper perfection of the issue on appeal below, or failure to properly raise the issue in the court of original jurisdiction. "Where highest court of the State delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, the United States Supreme Court will not take jurisdiction to review the judgment." Stembridge v. State of Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (Ga. 1952). Similarly, "When highest state court has failed to pass upon federal question, it will be assumed that omission was due to want of proper presentation in state court, unless aggrieved party in United States Supreme Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (N.Y. 1969). Appellee requests this Court to dismiss this appeal for failure of Appellant to establish the jurisdictional prerequisite.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent Constitutional and statutory provisions are set forth in the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

This appeal is from the South Carolina Supreme Court which affirmed on all but one (1) decision of the Family Court of the Fifteenth Judicial Circuit of South Carolina (hereinafter Family

Court). The South Carolina Supreme Court reversed the contempt finding and remanded the child support issue to the Family Court for a determination.

Appellant (father) and Appellee (mother) were divorced by the Circuit Court of Oakland County, Michigan by order filed in that Court on December 31, 1981. Appellee was given weekday custody of the parties' three minor children. This decree was not appealed. Subsequent to this decree, Appellant, during a period of weekend custody, removed the children from Michigan, changed their names and his name and social security numbers and moved to South Carolina where he resided for three and one-half (3½) years. The Michigan Court amended the 12/31/81 Order by its Order dated April 1, 1982 which granted Appellee full custody, found Appellant in Contempt, and issued a Bench Warrant for Appellant's arrest.

Through a missing children's network the children were located and the Appellee filed an action in South Carolina to enforce the Michigan custody decree.

The children were returned to their mother in August of 1985 by Judge David H. Maring, Sr. (hereinafter Judge Maring) of the Family Court in a Temporary Order dated August 16, 1985 which was not appealed. Judge David N. Wilburn, Jr. (hereinafter Judge Wilburn) of the Family Court in a Final Order filed October 28, 1985 enforced the Michigan custody decree including the child support provision and declined jurisdiction of the South Carolina courts of Appellant's counterclaim to modify the custody decree. Appellant did not appeal either order. Appellant did not pay child support as ordered. Therefore, by administrative procedure the Horry County Clerk of Court requested a Rule to Show Cause for contempt to be issued. The Rule was returned unserved due to the fact that Appellant had not advised the Clerk's office of his proper address as required by the October, 1985 Order of the Family Court. When, at the Rule hearing on December 11, 1985

Judge Maring was advised by the Horry County Clerk of Court that the Rule could not be served, Judge Maring then issued a Bench Warrant. The Horry County Sheriff served the Bench Warrant on Appellant at his employment and allowed Appellant to travel independently to the Sheriff's office in the Horry County Courthouse. Upon arrival later that day the Appellant was immediately escorted to Judge Maring's courtroom. By the time Appellant arrived at Judge Maring's courtroom, the Court session for the day was over because Judge Maring was required to attend mandatory judicial training. Judge Maring rescheduled the case to the next court session and set a $1,000.00 payment to be applied toward the child support arrearages as a condition for Appellant's release. Appellant's attorney had requested the matter to be rescheduled so that Appellant could file pleadings in response to the contempt and to modify the prior support Order. The Appellant did not appeal this Order. At the next session (December 16, 1985) Judge Maring issued an Order which was filed January 8, 1986, which again continued the hearing at Appellant's request to file pleadings, and modified the terms of Appellant's release to allow the posting of a $1,000.00 cash bond for Appellant's release. This Order was not appealed. The pleadings filed by Appellant requested the Family Court to vacate, revoke, or reconsider the prior Order of October 28, 1985 to decrease child suport and to hold a custody hearing. The Family Court, after a hearing on February 7, 1986 by Order dated February 27, 1986 denied Appellant's motions and petition, applied his bond toward the child support arrearages, found him in contempt, and provided for a jail sentence in the event he did not purge himself by paying all of his child support arrearages and a fine. The February 27, 1986 Order was appealed to the South Carolina Supreme Court. The Order of the South Carolina Supreme Court is the basis of this United States Supreme Court appeal. Appellant did not follow the South Carolina statutory procedures to stay

his sentence pending appeal and served the sentence.

Appellant has filed numerous pleadings in other forums involving the same issues raised in this appeal, many of which are still pending. On December 17, 1985 Appellant filed a Writ of Habeas Corpus in the Federal District Court of South Carolina challenging his incarceration and an action under 42 USC §1983 based on both the Family Court proceedings and his incarceration. The Writ of Habeas Corpus was dismissed without prejudice on June 12, 1986 and has not been appealed. The Civil Rights Action is presently pending, although the Magistrate has recommended dismissal. Appellant has recently filed custody pleadings in Indiana and had filed custody reconsideration pleadings in Michigan in October 1986 (which may still be pending). In addition to these actions the Appellant is also involved in litigation in South Carolina Family Court pursuant to the remand by the South Carolina Supreme Court on the appeal below.

ARGUMENT

I

APPELLANT'S JURISDICTIONAL STATEMENT TO THIS COURT DOES NOT COMPLY WITH THE SUBSTANTIVE ELEMENTS OF RULE 15 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES AND, BECAUSE OF THIS NONCOMPLIANCE, THE APPELLANT'S APPEAL IS JURISDICTIONALLY DEFECTIVE.

Rule 15.1(g) of the Revised Rules of the Supreme Court of the United States (hereinafter Rules) require Appellant to present, in his jurisdictional statement, a "concise statement of the case containing the facts material to consideration of the questions presented." The Appellant's statement of the case materially misstates the history of this case below, including erroneous references to numerous final and unappealed decisions against Appellant's position.

II

THE QUESTIONS PRESENTED BY THE APPELLANT FOR REVIEW BY THIS COURT ARE NOT SUBSTANTIVE, WERE NOT PROPERLY RAISED BELOW, AND WERE NOT EXPRESSLY PASSED ON BELOW.

"This Court will decline jurisdiction over an appeal when

the Constitutional questions raised by that appeal are not substantive." Zucht v. King, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (Tex. 1922).

A motion to dismiss an appeal from a state court is proper in this Court on the ground that an appeal " does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis." Rule 16.1(b) of Revised Rules of the Supreme Court of the United States. If the court below issued no opinion or fails to pass upon a federal question, this Court will generally deny jurisdiction on the grounds that the judgment might have rested on a non-federal ground or the question presented was not properly raised below. Stembridge and Street supra page 2. The issues raised by the Appellant fail to satisfy the jurisdictional requirements of this Court as stated above in the following particulars:

A. Appellant's question (1) for review:

1. Application of sections 20-7-870 and 20-7-880 S.C. Code Ann. (1976 as amended) were subject to final disposition by Order of the Family Court dated December 11, 1985 and not the February 27, 1986 Order. That Order was not appealed. Those Code sections do not provide any legal or factual basis for the rulings in the Order of Judge Maring dated February 27, 1986 and was not properly raised in the lower court appeal to the South Carolina Supreme Court.
2. The issue is moot because the Supreme Court reversed the contempt finding on factual grounds.
3. The Bench Warrant is not contained in the Transcript of Record to the South Carolina

Supreme Court below and therefore could not have been considered by that Court.

4. The issuance of the Bench Warrant and arrest was not timely raised on appeal in the South Carolina courts but was raised in the pleadings for the first time in the Writ of Habeas Corpus which was dismissed and not appealed.

5. The Appellant was not incarcerated until after he appeared before the court with his attorney and the court set the condition for his release. (Order of the Family Court dated December 11, 1986, South Carolina Supreme Court Transcript at 58.)

B. Appellant's question (2) for review:

1. The Appellant served the sentence; issue is moot.

2. The sentence allowed the Appellant to purge himself so that the sentence was not forced labor.

3. The Appellant could have avoided the sentence by following the South Carolina statutory procedure.

4. No forced labor requirement is found in the statute.

Appellant failed to timely appeal and/or pursue his remedies in the South Carolina courts.

6. The question was not expressly passed on by any court.

C. Appellant's question (3) for review:

1. In this appeal the South Carolina Supreme Court never considered the validity of 28 United States Code (hereinafter USC)

1738(e).

2. No custody determination was made by a South Carolina court. Judge Wilburn (October 28, 1985 Order of the South Carolina Family Court) in a prior unappealed order merely enforced a Michigan decree dated April 1, 1982 which was also unappealed, and declined jurisdiction of the custody issue.
3. The issue was never expressly raised or passed on by the South Carolina Supreme Court.
4. The Court has no jurisdiction pursuant to 28 USC §1257. This issue does not fit a direct appeal as it was not addressed by the South Carolina Supreme Court.
5. There were adequate non-federal grounds for the South Carolina Supreme Court decision.

D. Appellant's question (4) for review:

1. Appellant's custody claim was not timely appealed or expressly passed on by the South Carolina Supreme Court.
2. No South Carolina court issued a custody order.
3. There was an adequate non-federal basis for the appeal.
4. There is no authority in USC 28 §1257 for the appeal.

E. Appellant's questions (5) and (6) for review:

1. The issue of sex discrimination was never raised or expressly passed on by the South Carolina Supreme Court.
2. The South Carolina Supreme Court did not expressly or by implication apply a sexual basis for its decision.
3. No custody determination was made by any

South Carolina court.

F. Appellant's question (7) for review:

1. The prior order refered to by Appellant as giving full faith and credit, dated October 28, 1985, was not timely appealed and was res judicata as was the Michigan decree.
2. The issue was not timely raised or expressly passed on by the South Carolina Supreme Court.
3. There is no basis for direct appeal pursuant to USC 28 §1257.

G. Appellant's question (8) for review:

1. There is no basis for review pursuant to USC 28 §1257.
2. It was not timely raised or expressly passed on by the South Carolina Supreme Court.
3. No South Carolina court made a determination that it was precluded from modifiying a Michigan decree by the Full Faith and Credit Clause of the United States Constitution.
4. Appellant made no timely appeal of the South Carolina Family Court Order which gave Full Faith and Credit to the Michigan decree.

H. Appellant's question (9) for review:

1. Appellant never raised the issue of vagueness of the South Carolina custody law in any court below.
2. The issue was not timely raised or expressly passed on by the South Carolina Supreme Court.

I. Appellant's question (10) for review:

1. The Appellant was given notice and an opportunity to be heard at a full and plenary hearing held on February 7, 1986 based on his pleadings and the contempt for failure to pay

child support.

2. The Family Court took testimony from Appellant on February 7, 1986 in which he indicated that he had removed all of his assets except his automobile and the bond money from the State of South Carolina. The hearing which was held after Appellant had been given an opportunity to voluntarily pay his child support obligations complied with giving Appellant his due process of rights.

As is clear from a review of Appellant's questions presented, Appellant has failed to comply with Rule 15.

CONCLUSION

The Appeal as presented to the Court in Appellant's Jurisdictional Statement is frivolous and without merit. Appellant has attempted to contrive Constitutional issues which do not exist under the facts history of the case and court order below. The Appeal should be dismissed.

Respectfully submitted

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